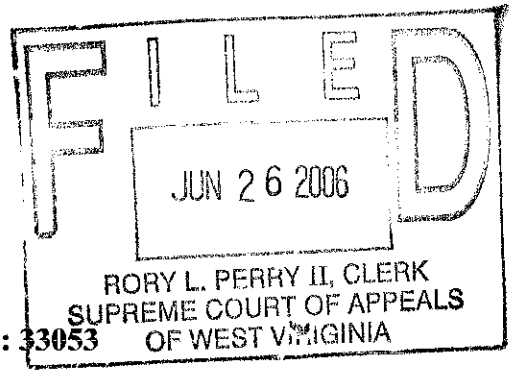
IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
In Charleston



Dianna MAE SAVILLA, Administratrix
of the Estate of LINDA SUE GOOD KANNAIRD,
deceased,

Petitioner,

vs.

No: 33053

SPEEDWAY SUPERAMERICA, LLC, d/b/a
RICH OIL COMPANY, LLC, a Delaware corporation,
Respondent.

Petitioner's Memorandum of Law in Response to
Respondent's Memorandum
& to Intervenor's Memorandum

Comes now the Petitioner, by counsel, Margaret L. Workman, and files this Memorandum in Reply to the Memorandum of the Respondent, Speedway SuperAmerica, and to the Memorandum of the Intervenor, Eugenia Moschgat.

Response to Speedway's Arguments

As a beginning matter, Speedway continues to make numerous mischaracterizations of the facts, but most of those are addressed in the Petitioners's original brief and the Court's time will not be wasted with the repetition of matters already addressed. However, the Petitioner does reiterate that the assertions made concerning the bad faith of the Respondent in improperly delaying the case for two years in federal court are based upon the written opinion of by U. S. District Court Judge Joseph Robert Goodwin, not the Petitioner's opinion.

Law of the Case Issue

It is not accurate that the Petitioner raises "the law of the case" issue for the first time in its memorandum of law in support of its Petition for Appeal. The issue of the law of the case is intricately interwoven with the standing issue, and that the law of the case doctrine was argued in that context both before the Circuit Court in connection with Speedway's motion to dismiss, and in the initial Petition for Appeal which was filed in this matter.

By way of background, the lower court heard extensive evidence and argument of counsel and on January 8, 2001, entered an extensive order (hereinafter sometimes called "the first order") setting forth numerous findings of fact and conclusions of law and directing that Eugenia Moschgat be removed as administratrix of the estate of Linda Kannaird and from her authority to conduct the litigation which ensued from Linda's death. By separate order, the lower court even removed Moschgat's name from the style of the case. Thereafter, on May 7, 2001, Moschgat filed a Petition for Appeal of that ruling to the West Virginia Supreme Court of Appeals, and on September 6, 2001, the Supreme Court refused to accept that appeal. See Exhibit 1, attached hereto and made a part hereof. As more fully set forth below, the Appellant contends that this rendered this order final, that the factual and legal conclusions contained in that order became **the law of the case**, and that the Appellant's right to conduct the deliberate intent and wrongful death claims was foreclosed from further litigation. Speedway obviously held the same belief for at least fifteen month after the entry of that order, for they proceeded to litigate the deliberate intent case solely against Dianna Mae Savilla as Administratrix. As soon as the Supreme Court refused the petition for appeal filed by Moschgat, Speedway no longer even served a copy of any of their deliberate intent motions and other filings on Moschgat or on her counsel, Cynthia

Ranson.[1] A review of the certificates of service executed by counsel for Speedway, as well as other counsel in the case, show clearly that the case was no longer litigated against Moschgat and that neither Moschgat nor her independent counsel were served, and disprove the assertion by Speedway that they always viewed Moschgat as still in charge of the deliberate intent litigation. Throughout all the proceedings and litigation that occurred subsequent to the entry of the lower court's first order, the Appellant has consistently argued that the lower court's first order, combined with this Court's refusal to accept the Petition for Appeal thereof, resolved the issue of **standing** in a final manner that should preclude either the Respondent or the new intervenor[2] Moschgat, from coming back years afterwards to try to undo that ruling. Furthermore, it is very important to note that this Court filed an opinion on June 30, 2005, styled *State ex rel TermNet Merchant Services, Inc v. Jordan*, 217 W. Va. 696, 619 S. E. 2d 209 (2005), which expanded the law of this state as to the "law of the case" doctrine and added strong support for the contention that the Appellant has made throughout, i.e. that the lower court's first order, and this Court's subsequent denial of an appeal thereof, **established the law of this case.** The *TermNet* case held that the effect of this Court refusing to accept a Petition for Appeal was to effectively render the order to which appeal was sought final and "the law of the case." Respondent Speedway skirts over that case, barely discussing it, and instead seeks to rely on an old 1939 case for the

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[1]In what can be characterized **at best** as disingenuous, Speedway now asserts to this Court that they never viewed the Appellant to be in charge of the deliberate intent case, despite the fact that for the fifteen months after the lower court's first order, the served all deliberate intent filings on Appellant and her counsel, not on Moschgat or her counsel.

[2]Moschgat's actions cannot even be characterized as disingenuous. After seeking to address the lower court's first order in this Court and failing to succeed in that effort, they come now more than five years later and attempt to re-open and re-argue all the factual and legal issues resolved by that order.

proposition that the law of the case doctrine "is not absolute but yields to the ends of justice." *Highland v. Davis*, 121 W. Va. 524, 6 S. E. 2d 922 (1939). The *TermNet* case, however, is precisely on point with the instant case from the standpoint of the legal effect of a Supreme Court refusal of a petition for appeal, and it was very recently decided.

Further, Speedway in its brief attempts to re-create reality by having the audacity to make this statement:

> It has never been (Speedway's) position that Eugenia Moschgat, as administratrix, should pursue this action against SSA rather than Linda (sic) Savilla, as administratrix. It is (Speedway's) position that whoever was found to be the proper administratrix could pursue the wrongful death action against the City of Charleston and the Charleston Fire Department. (Speedway) further contends that neither individual, as administratrix, is the proper party to pursue a deliberate intent action under the Workers' Compensation Act."

All that is necessary to refute that assertion is an examination of the court filings and other litigation activity that took place subsequent to the lower court's first order. A review of the record from below reflects that in the pleadings, motions and other items filed by Speedway, they did not serve Moschgat or her counsel, Ms. Ranson, after this Court declined to accept the Moschgat appeal.

Speedway, like everyone else in the case, knew that the issues before the Court involved, *inter alia*, who had the right to conduct and pursue the deliberate intent claim. Yet neither Speedway nor the Intervenor ever raised any of the issues upon which they now seek to rely when they had the opportunity. They instead treated the lower court's first order as a legitimate finding that the Appellant was in charge of the deliberate intent as well as the wrongful death litigation and Speedway proceeded for the next fifteen months to litigate the deliberate intent case against the Appellant, not against Ms. Moschgat. Similarly, Ms. Moschgat dropped out of

the litigation after her Petition for Appeal was refused, because she obviously viewed it in the same manner. The Appellant single-handedly conducted the deliberate intent litigation for the ensuing months and years, performing an immense amount of work and incurring approximately $40,000 to $50,000 in expenses on the case. See Exhibit 2, true copy of official docket sheet from the Clerk of the Circuit Court of Kanawha County. Both the Respondent Speedway and the Intervenor Moschgat were way more than "a day late and a dollar short" in attempting to raise the issues that they now seek to put forth.

Speedway attempts to bolster their argument against the law of the case doctrine, as set forth in *Termnet*, with the contention that the law of the case doctrine does not apply to give finality to judgments where jurisdiction is at issue. It then goes on to make the sweeping statement that the law of West Virginia and throughout the country **"suggests"** that the law of the case doctrine will not prevent a court from re-examining a claim of lack of subject matter jurisdiction. Yet Speedway provides no citation for this proposition. As will be set forth below, their argument concerning the lower court's lack of jurisdiction also has no merit.

Jurisdiction Issue

Speedway attempts to assert that the lower court lacked subject matter jurisdiction (i.e. judicial authority) to resolve the issues of who can bring a deliberate intent cause of action and who may seek damages under the deliberate intent statute, and therefore that the lower court lacked jurisdiction to enter the first order. However, Speedway provides no reasoning whatsoever on the basis for this contention, other than to assert that the Appellant lacked standing to file the Petition for Declaratory Relief which resulted in the lower court's first order. In support of their contention, Speedway merely cites several cases, all inapposite to the instant

case, wherein a court was found to be without jurisdiction. In addition to Speedway providing no real reasoning for their contention that the lower court lacked jurisdiction to act in this manner, it is the height of irony that Speedway now **fights to uphold a lower court order that exercised judicial authority on the exact same issues**, but this time in their favor! Apparently, they believe the lower court has jurisdiction so long as the ruling is in their favor. The Appellant contends that the lower court clearly had subject matter jurisdiction of the issues placed before it which resulted in its first order and which now has established the law of **this case**.[3]

First, an examination of the authority upon which Speedway relies:

Speedway cites *State ex rel. Smith v. Thornsbury*, 214 W.Va. 228, 588 S.E.2d 217 W.Va (2003), as support for their jurisdiction argument. However, that case dealt with a court lacking jurisdiction where a party failed to exhaust administrative remedies. That is inapposite to the instant situation.

Speedway also cites *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1959), (later overruled on other grounds by *Patterson v. Patterson* 167 W.Va. 1, 277 S.E.2d 709 (1981)), but that case dealt with lack of jurisdiction of a court to order the sale of real estate in a divorce action, again completely inapposite to the instant case.

The only case cited by Speedway which even comes close to explaining their reasoning for asserting a lack of jurisdiction in the lower court is *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997).

That case involved the issue of whether foster parents had standing to file a petition

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[3]Under the law of the case doctrine, the law established for an individual case has no binding effect on other cases in the future.

alleging abuse and neglect against adoptive parents, and whether the lower court had jurisdiction to hear it. Obviously, that factual scenario is completely inapposite to this case.

Furthermore, the Appellant contends that a close examination of the *Hill* case reveals that it provides support for Appellant's position on the standing issue.

The *Hill* case described the concept of standing as an element of jurisdiction as follows:

> ...standing refers to one's ability to bring a lawsuit because he/she has "such a personal stake in the outcome of the controversy as to insure the concrete adverseness upon which the court depends for illumination of the questions in the case." 14A Michie's Jurisprudence Parties § 18 (1989) (citing *Christman v. American Cyanamid Co.*, 578 F.Supp. 63 (N.D.W.Va.1983)).

The *Hill* case also made clear that the proper means of challenging a court's jurisdiction to hear a case was by prohibition, not appeal:

> The right to relief through the original jurisdiction proceeding of prohibition is statutorily recognized in this State. W.Va.Code § 53-1-1 (1923) (Repl.Vol.1994) provides that "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

Speedway has never utilized the office of prohibition to challenge the lower court's judicial authority to act in the underlying matter. In fact, they litigated the same issues before the lower court and then sought favorable ruling from the lower court on these same issues upon which they now assert the lower court lacked jurisdiction. They now seek to have upheld the lower court's order on these same issues.

The *Hill* case also pointed out that our Constitution provides both specific grants of power to circuit courts and a general, more inclusive jurisdictional provision encompassing grants of power which are intended by the Legislature, but which have not been specifically

enumerated. Article VIII, Section 6, of the West Virginia Constitution states, in part, that "[c]ircuit courts shall also have such other jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law." See also W.Va.Code § 51-2-2 (1978) (Repl.Vol.1994). Furthermore, this Court has made clear in case law that heirs and beneficiaries have the right to bring action to settle disagreements over the proper prosecution and administration of a wrongful death action. *See Trail v. Hawley*, 259 S.E. 2d 423 (W. Va. 1979). The *Trail* decision also made clear that a declaratory judgment action is the proper procedure for challenging the fiduciary duty of a personal representative. *See Trail at 425.* The case also held that:

The court before whom the action is brought should determine the facts in accordance with W. Va. Code 55-13-9 (1941) and render a decision regarding whether the representative is fulfilling his or her fiduciary duty.

In addition, this Court in *Collins v. Dravo Contracting Company*, 114 W. Va. 229, 171 S.E.757 (1933) made it abundantly clear that an administratrix was the proper person to pursue a deliberate intent claim. The Appellant is the administratrix of the Kannaird estate, pursuant to order entered by the lower court under his power to examine disputes between heirs and beneficiaries and she has acted in accordance with law as set forth in *Collins* in pursuing both the deliberate intent claim.

Other cases not cited by Speedway add further support to the Appellant's contentions.

In *West Virginia Secondary School Activities Commission v. Wagner*, 143 W.Va. 508, 102 S.E.2d 901 (1958), this Court held that jurisdiction relates to a court's inherent power to hear and decide a case. Syllabus Points 4 through 6 provided:

4. Jurisdiction consists of two elements. One of these elements is jurisdiction of the subject

matter and the other is jurisdiction of the person. Jurisdiction of the subject matter must exist as a matter of law. Jurisdiction of the person may be conferred by consent of the parties or the lack of such jurisdiction may be waived.
5. A court which has jurisdiction of the subject matter of litigation exceeds its legitimate powers when it undertakes to hear and determine the cause without jurisdiction of the parties.

Syllabus 6 also reiterated the fact that the proper means of challenging the lower court's jurisdiction would have been by prohibition,[4] not appeal:

> 6. The writ of prohibition lies as a matter of right when the inferior court does not have jurisdiction of the subject

Furthermore, in *State ex rel. Barden and Robeson Corp. v. Hill*, 208 W.Va. 163, 539 S.E.2d 106 (2000), this Court (citing *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 210, 220 S.E.2d 672, 679 (1975)), gave this guidance on the threshold standard for determining whether a court may exercise initial jurisdiction over an action:

> [T]he requirement of subject matter jurisdiction is met initially if: 1) the court has the general power to grant the type of relief demanded under any circumstances; 2) the pleadings demonstrate that a set of facts may exist which could arguably invoke the court's jurisdiction; and 3) the allegations both with regard to the facts and the applicable law are of sufficient substance to require the court to make, in an adversary proceeding, a reasoned determination of its own jurisdiction.

In *Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 210, 220 S.E.2d 672, 679 (1975), the Court established the threshold standard by which a court may exercise initial jurisdiction over an action:

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[4]In August 2000, the new Intervenor, Moschgat, did file a Petition for Writ of Prohibition, and that petition was also refused by this Court by order dated September 9, 2000. The petition did not allege lack of jurisdiction in the lower court, but instead that the court had exceeded its legitimate powers by the granting of a stay of the litigation pending resolution of the declaratory relief petition.

3) the allegations both with regard to the facts and the applicable law are of sufficient substance to require the court to make, in an adversary proceeding, a reasoned determination of its own jurisdiction.

Jurisdiction signifies the power of a court to speak the law, both in terms of formulating laws of general application and in terms of applying the law to individual cases. Further, the scope of a circuit court's jurisdiction is broad based. See Const. Art. 8, § 6; Code, 51-2-2. *Carey v. Dostert*, 1991, 406 S.E.2d 678, 185 W.Va. 247.

Clearly, the lower court did have subject matter jurisdiction in hearing and deciding the issues which were set forth by the Appellant's Petition for Declaratory Relief, which resulted in the lower court's first order. The case of *Trail v. Hawley* made abundantly clear that the proper forum for addressing a claim of a violation of fiduciary duty in connection with any type of wrongful death litigation was in the circuit court. And it is patently absurd for Speedway to now contend that the lower court ruling on the matter of who could bring the deliberate intent suit was "irrelevant." It apparently did not seem irrelevant to Speedway for the ensuing fifteen months that they spent litigating the deliberate intent case against only the Appellant. And Speedway apparently believed the lower court had jurisdiction to address the same issues when it entered the order that Speedway now asks this Court to uphold.

Entitlement to Damages Issue

Speedway goes on to argue that, even if the Appellant, acting as the duly appointed Administratrix, is permitted to continue to act as the plaintiff in the underlying litigation, then only Moschgat can recover damages in the deliberate intent action. Even if they are ultimately determined to be correct on this issue, they are premature in raising it and cannot prevail on this appeal based on that argument. Further, it highlights the fact that Speedway is now carrying

Moschgat's water and if this Court would require them to reveal the terms of their "confidential settlement" (entered in flagrant disregard of the lower court's first order), the Appellant believes that the reason would become clear.

Appellant Dianna Mae Savilla is the lawfully named Administratrix and the plaintiff in the deliberate intent legislation as authorized by this Court in *Collins*. Consequently, the lower court's second order was erroneous in dismissing the suit, and it must be reinstated and permitted to proceed.

Standing Issue

The Appellant reiterates all of its arguments as to the interpretation of both the statutory and case law relating to the deliberate intent cause of action in furtherance of its contention that the Appellant does have standing under that body of law to bring a deliberate intent claim. Specifically, Appellant cites *Parsons v. Shoney's*, 580 F. Supp. 129 (1983), from the U. S. District Court, Southern District of W. Va.. This case, which interpreted West Virginia law relating to the deliberate intent statute, was authored by the Honorable Charles Haden. In that case, the plaintiff brought action against her former employer, Shoney's, Inc, seeking to recover damages for personal injuries she sustained as a result of Shoney's allegedly willful, wanton, and reckless disregard for her safety. Her husband joined in this action seeking to recover damages for the loss of consortium he suffered as a result of his wife's injuries. In their motion to dismiss, Shoney's pointed out that the word "spouse" was conspicuously absent from the list of persons who had a deliberate intent cause of action against the employer. Thus, Shoney's argued that because the word "spouse" did not appear in this section, the spouse of an injured worker was not authorized by the statute to bring an action for loss of consortium under Section 23-4-2.

Judge Haden's opinion held:

While Shoneys' observation concerning the statutory language is, obviously, correct, the Court believes the inference drawn therefrom misses the mark. For purposes of this discussion, the crux of the above quoted section is the phrase "shall also have cause of action against the employer, as if this chapter had not been enacted...." This "provision preserves for employees a common law action against employers" where injury results from an employer's deliberate intent to produce such injury.

Speedway has argued that the case of *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S. E. 2d 138 (1996) established the principle that the deliberate intent cause of action supersedes all other causes of action, common law or statutory, and the Petitioner does not disagree with that contention. However, in establishing that principle, nothing in the *Bell* case obliterated all jurisprudential reasoning developed in West Virginia case law to that point on all aspects of the deliberate intent concept. Nor does the *Bell* case limit consideration of the jurisprudential development of case law relating to deliberate intent actions by this Court since that time. And nothing in *Bell* limits this Court in its ongoing obligation to interpret applicable statutes. Because the answer to the question before this Court requires analysis and is not susceptible to a simplistic answer, it is important to further analyze Judge Haden's reasoning and all the other case law developed in this area. Judge Haden in *Parsons* explained that the plaintiff (husband's) claim was derivative of his wife's action under W. Va. Code 23-4-2, and that his action did not arise from the statute itself, but as a natural consequence of his wife's injuries. Thus, (the husband's) claim did not depend upon specific statutory authority.

Similarly, the Petitioner contends that, as administratrix of Linda Kannaird's estate, she is acting in a derivative capacity for the deceased "employee," who the statute permits to file a claim. When the employee who is permitted to file a claim is deceased, then her estate can be the

proper entity to pursue the claim. Which persons ultimately may or may not actually "take" or receive proceeds from such claim may be an issue for another day. But it is clear from existing case law in *Collins* that under the same statutory language cited by the Respondent in support of its motion to dismiss, this Court has held that an administratrix of a deceased employee's estate has the right to pursue the deliberate intent claim on behalf of the estate. For that reason, it was completely improper for Ms. Moschgat to file the underlying litigation, engage in extensive court proceedings on the issue of who was the proper person to pursue the litigation, and then after losing that court battle, file an appeal, have that appeal declined, and then go out and negotiate her own secret settlement with Speedway without the knowledge or acquiescence of the person who the court had placed in charge of the litigation. By so doing, Speedway and Ms. Moschgat essentially thumbed their noses at the lower court's order. Petitioner contends that it is a pattern of Speedway to ignore workplace safety and then at seeking to avoid any sense of corporate responsibility for its actions.

Petitioner further contends that the very wording chosen by the Legislature in the deliberate intent statute, W. Va. Code 23-4-2(db), specifically its use of the word "take" in the parameters of the provision at issue, bodes against Speedway's contentions. The word "take" carries with it a meaning that is unique in the law relating to estate administration, e.g. the longstanding implication of one who "takes" clearly signifying that such taking is n a representative capacity. When one "takes," there is the clear suggestion that the taker is taking on behalf of those entitled to receive.

This Court also had a much more recent opportunity to examine the relationship of the *Bell* principles to the common law in the case of *Erie Ins. Property and Cas. Co. v. Stage Show*

Pizza, JTS, Inc., 210 W.Va. 63, 553 S.E.2d 257 (2001). The *Erie* decision is very important in connection with the arguments made by the Petitioner in this appeal. In the *Erie* case, this Court (citing W.Va. Code 23-4-2(b)) held that in a deliberate intent action, if an employee is able to establish that the employer acted with conscious, subjective deliberation and intentionally exposed employee to specific unsafe working condition, then the employer loses its workers' compensation immunity and may be subjected to suit for damages **as if workers' compensation law had not been enacted.** Erie (an insurer seeking to avoid liability for the employer's conduct) argued that under *Bell*, this Court conclusively ruled that a deliberate intent cause of action is a purely direct statutory cause of action expressed within the workers' compensation system, and that any liability imposed against an employer policyholder as a result of a deliberate intention lawsuit is liability arising entirely under a workers' compensation law. The appellant employee, however, argued that an employer subjected to a deliberate intent action under *Bell* does not become subject to a statutory sanction, but instead becomes liable for common law or other damages over and beyond any workers' compensation benefits received by an employee, "as if [the Workers' Compensation Act] had not been enacted[.]" In other words, while the deliberate intention statute specifies the evidence necessary to extinguish an employer's immunity under the Workers' Compensation Act, the statute only exposes an employer to an obligation for damages for any injuries proximately caused by the employer's conduct **as if workers' compensation law had not been enacted.** Since a deliberate intent cause of action results in damages which are not "workers' compensation benefits," the appellant in *Erie* argued that the Erie policy should be construed to find coverage for his deliberate intent cause of action. This Court agreed with that argument, and found that **the statute's imposition of liability "as if [the**

Workers' Compensation Act] had not been enacted[.]" required imposition of the damages which would have been imposed absent the enactment of the statute.[5] The Court reiterated that concept in *Marcus v. Holley*, 217 W. Va. 508, 618 S. E. 2nd 517 (2005). The Petitioner in the instant case now contends that case is also dispositive on the issue presented in Assignment of Error #1. If the Petitioner is successful at trial in presenting evidence sufficient to meet the criteria for proof of a deliberate intent claim, then the damages available will be those **as if the Workers Compensation Act had not been enacted.** Even the Respondent Speedway acknowledges that, prior to the enactment of this statute, the siblings could have sought and received damages for the death of their sister. In that instance, the administratrix of the estate would be able to conduct the litigation and each of those persons who she represents, the beneficiaries of the estate, would have the opportunity to present evidence to a jury, which would in turn determine, if any, to which each is entitled.

A closing reading of the *Bell* case holding makes it very clear the holding therein, that the statutory deliberate intent cause of action superseded all other causes of action, common law or statutory, dealt with the evidentiary requirements for making such a claim. It did not discuss who

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[5]The case of *Handley v. Union Carbide Corp.*, 804 F.2d 265 C.A.4 (W.Va.) (1986) provided background which is useful in the instant discussion: "In 1978, the West Virginia Supreme Court of Appeals issued a far-reaching decision in *Mandolidis v. Elkins Industries*, 161 W.Va. 695, 246 S.E.2d 907 (1978). It ruled that deliberate intention "must be held to mean that an employer loses immunity from common law actions where such employer's conduct constitutes an intentional tort or willful, wanton, and reckless misconduct." This holding stimulated much public debate and, in 1983, the West Virginia Legislature amended the compensation statute with the express intent of **modifying the standard** adopted in *Mandolidis*. The statute now states that "in enacting the immunity provisions of this chapter, the legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct." Emphasis added. Thus, it has been recognized that the primary statutory change was in setting forth the elements of the claim.

could bring the claim nor who had standing to seek damages. It did not modify whether damages were available pursuant to statute or common law. It did not even obliterate all the reasoning of the *Mandolidis* case; it simply clarified that the concept of what constitutes a deliberate intent claim had been altered by the legislature and that the criteria for a deliberate intent claim was now strictly defined by statute. *Mandolidis* provided that an employer would lose workers' compensation protection and be "subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort or engages in wilful, wanton, and reckless misconduct...." Those concepts have in fact now been reiterated by this Court in *Erie*, wherein this Court held that, once the evidentiary requirements for a deliberate intent have been fulfilled, the damages that are available are those **as if workers' compensation law had not been enacted.** That clearly includes the right for siblings to seek damages for the death of a decedent.

Thus, *Collins* makes crystal clear that the deliberate intent suit can be brought in the name of the administratrix of a decedent's estate. And *Erie* makes clear, that once the evidentiary requirements set forth in the statute extinguishes an employer's immunity under the Workers Compensation statutes, then the statute exposes the employer to an obligation for damages **as if workers' compensation law had not been enacted**. At common law, the beneficiaries of the decedent's estate would not be limited to those categories of persons enumerated in the deliberate intent statute. Further, under the wrongful death statute, the siblings clearly would have a cause of action.

Fiduciary Duty Issue

Speedway also attempts to obfuscate the real issues by focusing on the alleged violation

of fiduciary duty to Ms. Moschgat by the Appellant Savilla in her role as Administratix of the decedent's estate. First, Ms. Moschgat has made clear from the outset that she wished to have her own independent counsel in this matter. When the lower court determined that Ms. Moschgat was an inappropriate person to serve as administratrix, it also permitted the new administratrix, Mrs. Savilla, to choose counsel to represent the estate. Mrs. Savilla in her role as administratrix chose the undersigned as counsel for the estate, and entered into a contingency fee contract for legal services in connection therewith. Thereafter, Ms. Moschgat, reiterated her desire for independent counsel, albeit with it having been made clear that she would be personally responsible for payment of her counsel's fees. Mrs. Savilla, as administratrix, has kept Ms. Moschgat informed of the litigation and has not made any assertions about Ms. Moschgat that were not already found **as fact** by the first lower court order. Second, neither Ms. Moschgat nor Speedway should be permitted to relitigate an issue which was already fully litigated before the lower court (i.e. who is the proper administrator of the estate).

Sympathy Issue

Speedway maintains that the policy argument set forth by the Appellant is a "thinly veiled appeal to sympathy," and argue that the law should not be responsive to "an emotional response to an unusual situation."[6] Appellant argues that both the deliberate intent and the wrongful death statutes were intended to compensate those who suffer a loss by virtue of the death or injury of another. It is not only an unusual situation where a daughter refuses any contact with her own

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[6]Like many other phrases, this Speedway language is duplicated exactly by Moschgat in her filing with this Court, once again reflecting why Moschgat should never have been permitted to intervene at this late stage of this litigation. Speedway already shares a complete community of interest with them.

mother for twenty-five years, and refuses to permit her own mother to even meet her only grandson. The Moschgat brief asserts as "fact" items that not only are not in the record below, but which in fact are directly inconsistent with the facts which are in the record below. Apparently, Moschgat wants not only to re-open and re-litigate all the legal issues addressed by the lower court's first order, but even the matters found by the court as fact. In a situation where a person such as Ms. Moschgat cannot genuinely claim to have suffered any loss, yet seeks damages, fairness as a stated aim of the law relating to deliberate intent is important and the liberal interpretation in order to compensate victims that this Court has supported time and again is also important.

Certain Remedy Issue

The Appellant reiterates all of its argument previously made on the certain remedy issue.

The Public Interest Issue

Speedway evades Appellant's public interest argument by focusing on who is entitled to damages from the decedent's death, and skillfully avoiding the question of Speedway's conduct in seeking to avoid its corporate responsibility for providing fair compensation to those who **actually suffered a loss** from their actions. This Court should require Speedway and the intervenor Moschgat to reveal the parameters of their "confidential settlement," as previously moved by the Appellant, who believes that such information will reveal that this multi-million dollar out of state corporate entity has embarked on joining itself at the hip with Moschgat in order to get out of their wrongdoing in Mrs. Kannaird's death as cheaply as possible.

Moschgat's Arguments

Eugenia Moschgat should not have been permitted to intervene in this appeal in that she

did not qualify under the parameters of the Rule of Appellate Procedure. However, since the Court did permit such intervention, it falls to the Appellant to respond to her arguments.

To demonstrate the dilatory nature of the Intervenor, their memorandum of law consists of: (1) assertions of fact which have been made of whole cloth, not found in the record anywhere below and in many instances in direct conflict not only with evidence in the record, but also in direct conflict with findings of fact previously made by the circuit court; (2) a "cut and paste" from their earlier petition for appeal filed in 2001 and denied by this Court; and (3) a duplicate of the exact arguments, and in some instances the exact language, of Speedway.

Thus, under these circumstances, the Appellant relies upon its arguments heretofore set forth and as set forth above in response to Speedway's memorandum of law.

Summary

It is the Appellant's contention that the proceedings which resulted in the January 8, 2001, order clearly placed the issue of who could properly pursue the underlying litigation and seek damages for Linda's death before the lower court. Both Speedway and Ms. Moschgat had an opportunity to raise the issues of standing and jurisdiction in those proceedings, but they failed to do so. Instead, Speedway waited some fifteen months - - - subsequent to the court's extensive hearings and detailed rulings on the issue of who could properly conduct the litigation for the plaintiff, after the Supreme Court had declined to accept the appeal of the order addressing all these issues, after discovery in the underlying litigation was conducted, motions made, and the case was otherwise ready for trial[7] - - to raise the issue of standing for the first time. The

[7]Trial was set for December 2, 2002.

Defendant Speedway seized upon this so-called "new" issue,[8] claiming for the first time that a sibling acting as administrator of the estate of the decedent did not have standing under West Virginia Code 23-4-2(b),[9] the deliberate intent statute, to pursue a deliberate intent claim on behalf of the decedent. That is the basis upon which the Circuit Court granted Speedway's Motion to Dismiss (which actually became a Motion for Summary Judgment after the court considered items outside the pleadings), and it is the primary issue which is at the heart of this appeal.

Appellant believes that this case can easily be resolved by virtue of the "law of the case" doctrine. The issue of the propriety of who was to conduct the litigation was heard in full, and was decided by the lower court without Speedway or Moschgat ever, **in any way, shape, or form**, raising any of the issues they now assert; an extensive order was entered by the lower court; and a petition for appeal of that order was filed by Moschgat. Thereafter, this Court refused to accept that Petition for Appeal, rendering the lower court order the law of the case. For Speedway to now have the audacity to actually claim that "it has never been (Speedway's) position that Eugenia Moschgat, as administratrix, should pursue this action against (Speedway) rathern than Linda (sic) Savilla, as administratrix. It is (Speedway's) position that whoever was found to be the proper administratrix could pursue the wrongful death action against the City of Charleston..." This claim does not comport with the record of this case. Further, the reason for

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[8]Defendant Speedway presented this issue by way of a Motion for Judgment on the Pleadings, and later a Motion to Dismiss on the same grounds.

[9]The portion of the statute at issue in the present case was previously designated as West Virginia Code § 23-4-2(c) and was amended and redesignated as West Virginia Code § 23-4-2(d). Other than minor stylistic alterations, the language was not changed.

the law of the case doctrine is that our legal system recognizes that there is a time for properly represented parties to have their day in court, to state their positions, raise objections, and make legal arguments. Both Speedway and Moschgat failed to raise any of these issues at a time when they were legitimately before the lower court. Speedway later raised new issues relating to the same subject matter before the same lower court, and argues that the second lower court order should be upheld. This is directly inconsistent with their assertion that the lower court lacked jurisdiction of the subject matter of these issues.

The lower court order, which is the subject of this appeal, also was immensely unfair to the Appellant beneficiaries who have litigated this case without any help from Moschgat or her counsel for six years and who have expended in the neighborhood of $40,000 to $50,000 in expenses conducting the litigation.

In consequence of all of which, the Appellant respectfully requests this Court to reverse the order of the lower court which is the subject of this appeal and to remand this case to the Circuit Court with directions to permit the Appellant to proceed to trial.

Dianna Mae Savilla, Administratrix
By Counsel

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IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
In Charleston

Dianna MAE SAVILLA, Administratrix
of the Estate of LINDA SUE GOOD KANNAIRD,
deceased,

Petitioner,

vs. **No: 33053**

SPEEDWAY SUPERAMERICA, LLC, d/b/a
RICH OIL COMPANY, LLC, a Delaware corporation,
Respondent.

Certificate of Service

I, Margaret L. Workman, counsel for the Petitioner the above-styled case, certify that on the 26th day of June, 2006, I served a true and correct copy of the foregoing **Petitioner's Memorandum of Law in Response to Respondent's Memorandum & to Intervenor's Memorandum** upon all counsel of record by depositing a true copy thereof in the U. S. Mail, postage prepaid, to them at their office addresses as indicated below:

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